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No. 90-1718

Supreme Court, U.S.
FILED
JUN 5 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; LEIGH PEGUES, Director of the Alabama Department of Environmental Management; and GUY HUNT, Governor of Alabama,

Petitioners,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; and CHEMICAL WASTE MANAGEMENT, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE STATE OF SOUTH CAROLINA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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June 5, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

ADDITIONAL QUESTION PRESENTED

If the Court grants the petition for writ of certiorari, it should specify one additional question, as follows:

> Whether the court of appeals erred in using dormant Commerce Clause principles to test the challenged portions of Alabama's hazardous waste program rather than using the standard adopted by the U.S. Environmental Protection Agency ("EPA") to test consistency of state hazardous waste programs with federal law pursuant to the Resource Conservation and Recovery Act of 1976 ("RCRA"), when Alabama's program has been authorized by EPA to operate "in lieu of" federal law under RCRA.

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BRIEF OF THE STATE OF SOUTH CAROLINA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The State of South Carolina respectfully submits this brief pursuant to this Court's Rule 37.5 as *Amicus Curiae* in support of the Petition of the Alabama Department of Environmental Management ("ADEM"); Leigh Pegues, Director of ADEM; and Guy Hunt, Governor of the State of Alabama, for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in these proceedings on August 8, 1990, 910 F.2d 713, as modified upon denial of rehearing, 924 F.2d 1001.

INTEREST OF THE STATE OF SOUTH CAROLINA

The State of South Carolina, like Alabama, has been authorized by the U.S. Environmental Protection Agency ("EPA") to operate a hazardous waste management program "in lieu of" federal law pursuant to Section 3006(b) of the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), 42 U.S.C. § 6926(b). Portions of South Carolina's program have also been challenged in federal court by private parties on Commerce Clause grounds. In South Carolina's case, on January 11, 1991, the U.S. District Court for the District of South Carolina preliminarily enjoined broad portions of South Carolina's program as violating the Commerce Clause. *Hazardous Waste Treatment Council v. South Carolina*, 32 Env't Rep. Cas. (BNA) 1646 (D.S.C. 1991), *appeal pending*, No. 91-2317 (4th Cir., argued May 6, 1991). The District Court for the District of South Carolina, like the court of appeals here, reached its decision based upon dormant Commerce Clause principles, rather than by reference to the special standard adopted by EPA to test the consistency of a state's federally-approved hazardous waste program with federal law, including effects on interstate commerce. South Carolina has appealed the district court's preliminary injunction to the U.S. Court of Appeals for the Fourth Circuit; after expedited briefing, oral argument on its appeal was heard May 6, 1991. Although the respective laws of Alabama and South Carolina under challenge are factually distinct, explication by this Court of the proper standard for judging effects on interstate commerce of approved state hazardous waste regulatory programs would be important to guide South Carolina, and EPA, and the states generally, in the appropriate implementation of the federal structure of RCRA.

ADDITIONAL STATUTES AND REGULATORY PROVISIONS INVOLVED

Pertinent portions of Sections 3006 and 3009 of RCRA, 42 U.S.C. §§ 6926 and 6929, are set out in an Appendix to this brief, along with EPA's implementing regulation, 40 C.F.R. § 271.4. Also set out in the appendix is 50 *Fed. Reg.* 46,437-440 (November 8, 1985), a decision by EPA applying 40 C.F.R. § 271.4(a) in approving South Carolina's hazardous waste program. The program included higher fees for disposal within the State of hazardous wastes generated outside the State than for disposal of wastes generated within South Carolina.

SUPPLEMENTAL STATEMENT OF THE CASE

RCRA Section 3006(b) provides that a state may be authorized to "administer and enforce a hazardous waste program" upon authorization from EPA. 42 U.S.C. § 6926(b). EPA *must* authorize the state program unless EPA finds that it "is not equivalent to the Federal program," "is not consistent with the Federal or State programs applicable in other States," or "does not provide adequate enforcement of compliance with the requirements of [RCRA]." *Id.*

Once the state's program is approved by EPA, the state "is authorized to carry out such program in lieu of the Federal program." *Id.* Any action taken by a State under an authorized hazardous waste program has "the same force and effect as action taken by [EPA] under [RCRA]." 42 U.S.C. § 6926(d). In addition, RCRA Section 3009 expressly authorizes the states to impose hazardous waste laws "which are more stringent than those imposed by [RCRA]," and it preserves state authority against preemption by federal regulatory requirements, provided that the state provisions are not "less stringent than those authorized under [RCRA Sections 3001-3020] respecting the same matter." 42 U.S.C. § 6929. A state's authorization continues until EPA de-

termines after a public hearing that the state program no longer conforms with federal requirements. 42 U.S.C. § 6926(e).

Alabama's hazardous waste management program was approved as not inconsistent with RCRA on December 8, 1987. *See* 52 *Fed. Reg.* 46,466 (December 8, 1987). Until authorization is withdrawn, therefore, action taken by Alabama pursuant to its program operates with "the same force and effect as action taken by [EPA]."

EPA's regulations governing the authorization of state hazardous waste programs are contained in 40 C.F.R. Part 271. The regulations establish standards to evaluate whether a state hazardous waste program is "consistent" with federal law, and these standards explicitly address effects on interstate commerce. In particular, 40 C.F.R. § 271.4(a) provides:

> Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

In addition, the regulations provide for periodic review by EPA of changes in state programs after they have been authorized, 40 C.F.R. § 271.21, and they specify criteria and procedures for withdrawal of authorization, including citizen petitions to EPA for public withdrawal and participation in withdrawal proceedings, *id.* §§ 271.22-23.

EPA adopted Section 271.4(a), its "reasonableness" test for adjudging effects on interstate commerce under RCRA, after giving explicit consideration to statutory requirements and to holdings of this Court interpreting the "dormant" Commerce Clause. *See* 45 *Fed. Reg.*

33,290, 33,395 (May 19, 1980).[1] EPA has characterized the "unreasonably restricts" language of Section 271.4(a) as creating a "facts and circumstances test." 50 *Fed. Reg.* 46,437, 46,440 (November 8, 1985), Appendix *infra*, at 13a. In evaluating a restriction on the interstate movements of hazardous waste, EPA "will look to all relevant factors." *Id.* at 46,439, Appendix *infra*, at 11a. EPA considered the relevance of this Court's holding in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), to its test, but concluded that the "Agency is not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and declines to do so here." 50 *Fed. Reg.* at 46,439, Appendix *infra*, at 11a.

The requirements in RCRA for facilities which actively generate, treat, store, and dispose of hazardous wastes are complemented by provisions in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). CERCLA provides for remedies to be applied at a facility or property that has been contaminated with hazardous substances, and it makes broad categories of persons liable for costs of cleanup. In 1986, a provision was added to CERCLA to address assured capacity for treating and disposing of hazardous wastes. As added by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Paragraph 104(c)(9) of CERCLA provides that each State must provide assurance to EPA that the State will "have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during" the next 20 years. 42 U.S.C. § 9604(c)(9). *See* Petition at 2-3.

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[1] EPA took account of the fact that RCRA for some purposes requires reference to the state of origin of hazardous wastes, *e.g.*, for operation of the "manifest" system of tracking wastes, 40 C.F.R. Part 262, Subpart B. The RCRA regime also must accommodate implementation of states' "more stringent" requirements under Section 3009 of RCRA, 42 U.S.C. § 6929.

EPA's implementation of this capacity-assurance provision of CERCLA is closely tied to and coordinated with its RCRA regulatory regime. As specified in CERCLA § 104(c)(9), EPA required each state by October 17, 1989, to submit for approval a Capacity Assurance Plan demonstrating that adequate means had been or would be provided for all hazardous wastes generated within the state over the following 20 years, to 2009. In a policy memorandum dated December 23, 1988, then-Administrator Lee Thomas directed that the process for developing, evaluating, and approving Capacity Assurance Plans be used as EPA's primary means of addressing "State action which may be inconsistent with the federal Resource Conservation and Recovery Act program," and that the RCRA state-authorization withdrawal process be used only "after determining that the CERCLA process has proven ineffective." Memorandum from Lee M. Thomas to Regional Administrators, "Policy Regarding Hazardous Waste Management Capacity and RCRA Consistency Issues" (December 23, 1988).

REASONS FOR GRANTING THE WRIT

The Court Of Appeals' Erroneous Reliance On Dormant Commerce Clause Principles, Rather Than Application Of The Standard Derived From Congress' Exercise Of Commerce Clause Power, Presents Important Legal Issues Respecting State Powers And The Proper Administration Of RCRA.

The court of appeals' reliance on the dormant Commerce Clause to invalidate Alabama's hazardous waste program disrupts the balance between federal and state regulation previously struck by Congress when it enacted RCRA and entrusted its administration to EPA. Because of the importance of this issue to the states and to the proper administration of RCRA and hazardous waste management pursuant to RCRA, the petition for writ of certiorari should be granted.

The Commerce Clause is an explicit grant of power to Congress. U.S. Const. art. I, § 8, cl. 3. Although in the

absence of congressional action the "dormant" Commerce Clause is a "self-executing limitation on the power of the States," *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984), once Congress has exercised its powers, the constitutional measure of state action is not that provided by the dormant Clause, but rather congressional language and intent, *Northeast Bancorp Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985); *Wunnicke*, 467 U.S. at 91-92. As a result of the enactment of RCRA and, subsequently, the 1986 amendments to CERCLA, "the commerce power of Congress is not dormant, but has been exercised by that body," *Northeast Bancorp*, 472 U.S. at 174.

Congress provided in RCRA that, upon approval by EPA, a state's hazardous waste program operates "in lieu of the Federal program." RCRA § 3006(b), 42 U.S.C. § 6926(b). Congress empowered EPA to develop and enforce implementing regulations for RCRA, and EPA has done so to explicate Section 3006(b). In those regulations EPA has specified the standard to be applied to determine whether the effects on interstate commerce of a state's hazardous waste program are impermissible. Specifically, only an aspect of a state program which "*unreasonably* restricts, impedes, or operates as a ban" on the interstate movement of hazardous waste "shall be deemed inconsistent" and thus not in compliance with Section 3006. 40 C.F.R. § 271.4(a) (emphasis added).

In adopting and applying Section 271.4(a), EPA considered and dismissed the proposition that states could not impose restrictions on interstate commerce in hazardous waste. EPA expressly rejected the contention revived by the court of appeals in the present case that a "virtually *per se* rule of invalidity," *City of Philadelphia*, 437 U.S. at 624, applies to state hazardous waste measures affecting interstate commerce. *Compare* 50 *Fed. Reg.* 46,437, 46,439 (November 8, 1985), Appendix *infra*, at 11a-12a, *with* 910 F.2d 713, 719-20, Pet. App. A-8 - A-13.

Instead, EPA stated that "Section 271.4(a) does not by its terms prohibit any restrictions or impediments, only those that are unreasonable." 50 *Fed. Reg.* at 46,439, Appendix *infra*, at 11a. EPA determined that "all relevant factors" must be considered in assessing the permissibility of state laws with interstate effects. *Id.* In establishing that its reasonableness test applies, and not *per se* rules under the dormant Commerce Clause, EPA was quite pointed:

> *Congress gave EPA the authority to interpret the term "consistent"*; the Agency has interpreted the term in § 271.4 to prevent unreasonable restrictions or impediments in authorized programs. *Nothing in RCRA section 3006(b) or any other section of RCRA requires the Agency to adopt the Constitutional test* as the test for consistency or unreasonable restrictions or impediments.

Id. (emphasis added), Appendix *infra*, at 12a.

The fact that Alabama's Holley Bill was adopted after EPA approved Alabama's hazardous waste program does not deprive it of its force under RCRA or subject it to scrutiny under dormant Commerce Clause precedents rather than 40 C.F.R. § 271.4(a). A state "program" approved pursuant to RCRA § 3006(b) is not static. Once approved, the State "is authorized to carry out [its] program *in lieu of the Federal program*," 42 U.S.C. § 6926(b) (emphasis added), unless and until EPA withdraws authorization of the program as a whole, *id.* § 6926(e). Change within a state's approved program does not require subsequent EPA authorization to become effective. Instead, "[p]rogram revision *may* be necessary when the controlling Federal or State statutory or regulatory authority is modified or supplemented." 40 C.F.R. § 271.21(a) (emphasis added).[2] EPA explained the dis-

[2] This arrangement contrasts with State Implementation Plans under the Clean Air Act, for example, where state revisions to the plans are not effective unless expressly approved by EPA. *See* 42

cretionary nature of its power specifically in the context of state provisions that affect interstate waste:

> If an authorized State adopts restrictions or impediments that may affect the flow of hazardous wastes, EPA *may find* that such changes are significant revisions to the State's program and provide public notice and comment under § 271.21 on their potential impacts on interstate transportation of wastes. If the restrictions or impediments are found to be *unreasonable*, they would be grounds for withdrawal of the authorized program under § 271.22.

50 *Fed. Reg.* at 46,440 (emphasis added), Appendix *infra*, at 14a.

Although the court of appeals acknowledged in passing that Congress may redistribute power over interstate commerce, 910 F.2d at 721, Pet. App. at A-13, its exclusive reliance on dormant Commerce Clause cases effectively nullifies this fundamental precept.[3] "When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce . . . . Courts are final arbiters under the Commerce Clause only when Congress has not acted." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154-55 (1982) (footnote and citations omitted). Once Congress has acted, as it has here, the question is not determined by whether "the commerce clause 'of its own force' and without reference to any action by Congress . . . forbids discriminatory state" law, *Prudential Ins. Co.*, 328 U.S. at 422. Rather, the crucial questions are whether Congress has acted legitimately and "whether the policy stated [by Congress] extends to the kind of state legisla-

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U.S.C. § 7410(a). *See generally General Motors Corp. v. United States*, 110 S. Ct. 2528 (1990).

[3] The court of appeals should have stated this basic proposition in stronger terms. As this Court has said: "The commerce clause is in no sense a limitation upon the power of Congress over interstate and foreign commerce." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946).

tion which is immediately in issue." *Id.* at 427. And, contrary to the approach of the court of appeals in relying on *City of Philadelphia*, "those questions are not answered . . . by any conception that Congress' declaration of policy adds nothing to the validity of what states have done within the area covered by the declaration." *Id.*

The court of appeals misconstrued the effect of the cases decided on the basis of Congress' exercise of its Commerce Clause power by suggesting that congressional approval of the state's law must be " 'expressly stated.' " 910 F.2d at 721, Pet. App. at A-13. This Court has not been so grudging in giving effect to Congress' power, nor could it, for in taking so limited an approach "Congress' power over commerce would be nullified to a very large extent." *Prudential Ins. Co.*, 328 U.S. at 422. Contrary to the court of appeals' invocation, "[t]here is no talismanic significance to the phrase 'expressly stated.' " *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984). Rather, "it merely states *one way* of meeting the requirement . . . for a state regulation to be removed from the reach of the dormant Commerce Clause," the ultimate test of which is "congressional intent." *Id.* (emphasis added). *See White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 213 (1983).[4]

The court of appeals was thus wrong to conclude that its task was simply "to determine whether Congress has authorized Alabama to erect its barrier to the interstate movement of hazardous wastes." 910 F.2d at 721, Pet. App. at A-13. Congress has authorized EPA to promulgate regulations and policies to implement RCRA and CERCLA, and EPA has addressed through these routes the permissibility of state hazardous waste laws that

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[4] In that regard, "[w]hen Congress enters the field by legislation, we try to discover to what extent it intended to exercise its power of redefinition" over the dormant Commerce Clause. *California v. Zook*, 336 U.S. 725, 728 (1949).

affect interstate commerce in hazardous waste. Just as the Federal Reserve Board is "an authoritative voice on the meaning of a federal banking statute," *Northeast Bancorp*, 472 U.S. at 168, so too is EPA's interpretation authoritative with respect to RCRA. This Court is required to defer to EPA's construction of RCRA and conclude that the pertinent standard for regulation by a state respecting interstate waste is the reasonableness standard of 40 C.F.R. § 271.4(a) as elucidated at 50 *Fed. Reg.* 46,439, Appendix *infra*, at 10a-13a. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 US. 837, 843 (1984).[5]

The court of appeals further erred in failing properly to account for the impact of the capacity assurance requirements in CERCLA § 104(c)(9), 42 U.S.C. § 9604(c)(9), on the legality of Alabama's Holley Bill. In assessing the reasonableness of a state restriction on interstate movement of hazardous waste under Section 271.4(a), the most "relevant factor" is the requirement of CERCLA § 104(c)(9)(A), 42 U.S.C. § 9604(c)(9)(A), that a state provide assurance that it will have available "adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes *that are reasonably expected to be generated within the State*" over the next 20 years (emphasis added). By its very terms, CERCLA § 104(c)(9) requires a state to give separate regard to wastes generated within its borders, and to demonstrate that it has provided explicitly for their treatment or disposal.

Moreover, the Section allows this demonstration to be provided by only limited means: the facilities relied upon

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[5] EPA's interpretation is expressed in its regulations, policies and decisions applying those regulations and policies. *Investment Co. Institute v. Camp*, 401 U.S. 617, 628 (1971). Section 271.4(a) is established as law barring subsequent amendment because the time period for bringing a petition for judicial review of the regulation has long passed, and by statute the regulation may not otherwise be attacked. *See* 42 U.S.C. § 6976(a)(1); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 594 (1980) (Powell, J., concurring).

must either be "within the State or outside the State in accordance with an interstate agreement or regional agreement or authority." CERCLA § 104(c)(9)(B), 42 U.S.C. § 9604(c)(9)(B). Thus, not only does the statute specify that the state must distinguish in-state generators from those out-of-state, it requires that the state specifically account for in-state generated waste in connection with its in-state treatment and disposal facilities. Whether the state allocates all in-state capacity to in-state waste, all to out-of-state waste, or something in between, the statute requires that an allocation be made for the state's assurance of capacity to have any real meaning and practical effect. There simply is no way for a state without affecting interstate commerce to comply with Section 104(c)(9)'s requirement to ensure capacity for in-state waste, short of making infinite capacity available, which is not what Congress contemplated.

EPA has recognized the relevance of CERCLA § 104(c)(9) to the "consistency" standard of 40 C.F.R. § 271.4(a) by tying its implementation of CERCLA's capacity assurance requirement to its RCRA regulatory regime. In December 1988, then-EPA Administrator Lee Thomas directed that EPA's "CERCLA capacity assurance process should be used as an initial response to State actions which prohibit waste management within State boundaries without environmental justification." Memorandum from Lee M. Thomas to Regional Administrators (Dec. 23, 1988). Notwithstanding the fact that "the procedures for withdrawal of authorized State RCRA programs" could provide a remedy for such "unreasonable restrictions on interstate waste movements," the Administrator directed that withdrawal procedures should be considered only "after determining that the CERCLA process has proved ineffective." *Id.*

The long-standing constitutional principles governing this case were summarized in *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408 (1946). In *Prudential Ins. Co.*, the

challengers, like the court of appeals here, sought to relegate pertinent federal statutes entirely "to one side, either as not intended to have effect toward validating this sort of [state law] or, if construed otherwise, as constitutionally ineffective to do so." *Id.* at 422. Those questions cannot be so dismissed; they have primacy and are of "controlling" significance. *Id.* Because of the importance of those issues to the States and the administration of the nation's hazardous waste laws, the petition should be granted.

CONCLUSION

For the reasons set forth above, and those set forth in the Petition for Certiorari, the requested petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

RCRA Section 3006(b), 42 U.S.C. § 6926(b):

§ 6926. Authorized State hazardous waste programs

* * * *

(b) Authorization of State program

Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program. Within ninety days following submission of an application under this subsection, the Administrator shall issue a notice as to whether or not he expects such program to be authorized, and within ninety days following such notice (and after opportunity for public hearing) he shall publish his findings as to whether or not the conditions listed in items (1), (2), and (3) below have been met. Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste (and to enforce permits deemed to have been issued under section 6935(d)(1)[13] of this title) unless, within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized and, within ninety days following such notice and after opportunity for public hearing, he finds that (1) such State program is not equivalent to the Federal program under this subchapter, (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subchapter.

In authorizing a State program, the Administrator may base his findings on the Federal program in effect one year prior to submission of a State's application or in effect on January 26, 1983, whichever is later.

RCRA Section 3009, 42 U.S.C. § 6929:

§ 6929. Retention of State authority

Upon the effective date of regulations under this subchapter no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations, except that if application of a regulation with respect to any matter under this subchapter is postponed or enjoined by the action of any court, no State or political subdivision shall be prohibited from acting with respect to the same aspect of such matter until such time as such regulation takes effect. Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations. Nothing in this chapter (or in any regulation adopted under this chapter) shall be construed to prohibit any State from requiring that the State be provided with a copy of each manifest used in connection with hazardous waste which is generated within that State or transported to a treatment, storage, or disposal facility within that State.

40 C.F.R. § 271.4:

§ 271.4 Consistency.

To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below. For purposes of this section the phrase "State programs applicable in other States" refers only to those State hazardous waste programs which have received final authorization under this part.

(a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

(b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.

(c) If the State manifest system does not meet the requirements of this part, the State program shall be deemed inconsistent.

Federal Register—Vol. 50, No. 217

Friday, November 8, 1985

Rules and Regulations

[46437]

40 CFR Part 271

[OSW-FRL-2921-6]

South Carolina; Decision on Final Authorization of State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency.

ACTION: Notice of Final Determination on South Carolina's Application for Final Authorization.

SUMMARY: South Carolina has applied for Final Authorization under the Resource Conservation and Recovery Act (RCRA). EPA has reviewed South Carolina's application and has reached a final determination that South Carolina's Hazardous Waste Program satisfies all of the requirements necessary for Final Authorization. Thus, EPA is granting Final Authorization to the State to operate its program in lieu of the Federal program.

EFFECTIVE DATE: Final Authorization for South Carolina, for purposes of judicial review, shall be effective at 1:00 p.m. Eastern time on November 22, 1985. However, in accordance with § 271.20(e), this Notice constitutes the Agency's official decision to approve South Carolina for Final Authorization.

FOR FURTHER INFORMATION CONTACT: Otis Johnson Jr., Chief, Waste Planning Section, Residuals Management Branch, Waste Management Division, U.S.

Environmental Protection Agency, 345 Courtland Street N.E., Atlanta, Georgia 30365, (404) 257-3016.

SUPPLEMENTARY INFORMATION:

I. Background

Section 3006 of the Resource Conservation and Recovery Act (RCRA) allows the Environmental Protection Agency (EPA) to authorize State hazardous waste management programs to operate in the State in lieu of the Federal program. To qualify for Final Authorization, a State's program must: (1) Be "equivalent" to the Federal program, (2) be consistent with the Federal program and other State programs, and (3) provide for adequate enforcement (Section 3006(b) of RCRA, 42 U.S.C. 6226(b) [sic]). On July 23, 1984, South Carolina submitted a complete application to obtain Final Authorization to administer a RCRA program. On October 25, 1984, EPA published a tentative decision announcing its intent to grant South Carolina Final Authorization. Further background on the tentative decision appears at 49 FR 42959, October 25, 1984.

In the October 25 notice announcing the Agency's tentative determination, EPA announced the availability of the State's application for public review and comment and the date of a public hearing on the application. The public hearing was not held, since neither EPA nor the South Carolina Department of Health and Environmental Control received a significant show of interest in holding the hearing.

On March 5, 1985, the decision to grant final authorization to South Carolina was temporarily postponed. At that time, EPA decided to defer a final decision until July 1985 to allow the State a reasonable period of time to resolve identified issues.

Prior to EPA's review of the State's performance in July 1985, the South Carolina Hazardous Waste Man-

agement Act (1935 Act No. 436) was amended to establish increased fees for disposal of hazardous waste. The amendments passed in June 1985 changed section 44-56-170 to raise the fee for land disposal of wastes generated within the State from $5.00 to $13.00 per ton. For land disposal of wastes generated outside the State, the fee was raised from $7.50 per ton to either $18.00 per ton or to the amount that would be charged for land disposal by the State in which the wastes were generated, whichever is higher.

[46438] EPA determined that this statutory change constituted a substantial program revision, and in accordance with 40 CFR 271.20(b), the Agency decided to solicit public comment. On September 13, 1985 (50 FR 37385), EPA published a second notice of tentative determination to approve the State. In that notice, EPA highlighted the question of whether the South Carolina Hazardous Waste Management Act Amendments rendered the State program inconsistent with the Federal program or approved State programs under RCRA.

The question to be settled before EPA granted final authorization was whether the South Carolina fee schedule rendered the State program inconsistent with the Federal program and other State programs. Under § 271.4(a) a State treatment, storage or disposal at facilities authorized to operate under the Federal or an approved State program . . .". [sic]

In the notice of tentative determination, EPA stated that while higher fees for out-of-State wastes should not be encouraged, the Agency did not have any evidence to indicate that the new fees would unreasonably restrict, impede, or operate as a ban on the transportation of hazardous waste into the State. The only evidence before the Agency at that time were South Carolina's statements that the fee imposed constitutes a "relatively small percentage" of the actual cost of disposal and that, in the State's view, it would not unreasonably restrict or im-

pede the movement of hazardous waste (50 FR 37386, September 13, 1985). The Agency solicited comment on whether the State law unreasonably restricts, impedes or operates as a ban on the importation of hazardous waste, under the consistency requirements of 40 CFR 271.4(a). EPA received written comments and also held a public hearing in Columbia, South Carolina.

II. Basis for EPA's Decision to Grant Final Authorization

The Agency today is making a final determination that the South Carolina fee schedule does not impose an unreasonable impediment or restriction or operate as a ban on the free movement of hazardous waste under 40 CFR 271.4. The fee schedule is not inconsistent with the Federal program or approved State programs under this regulation or under RCRA. This section explains the reasons for the Agency's decision on this matter. Because this was the only outstanding issue, the Agency is now able to grant final authorization to the State.

A. EPA's regulation

EPA adopted the present regulation at 40 CFR 271.4(a) on May 19, 1980 (see 45 FR 33395, 33465-66, May 19, 1980). The regulation states that any aspect which "unreasonably restricts, impedes or operates as a ban" is deemed inconsistent.

In the preamble discussing § 271.4(a), EPA explained the regulation as follows. The Agency stated that any aspect of the program which operates as a ban on the interstate movement of hazardous waste is automatically inconsistent. The Agency noted that this position was supported by a court decision, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which held unconstitutional a statute banning transportation of certain wastes into the State for disposal because it violated the commerce clause of the Constitution. (This discussion is consistent

with that in the preamble to the proposed regulation (44 FR 34259, June 14, 1979).)

EPA did not discuss what criteria it would apply in determining whether State programs unreasonably restrict or impede the free movement of hazardous waste. However, it is clear from the regulation that EPA intended "unreasonable restrictions or impediments" to render State programs inconsistent. The question of whether a State provision unreasonably restricts or impedes the free movement of hazardous waste did not arise in any final decision to grant RCRA final authorization until South Carolina's amended statute raised this issue.

B. The Agency's Tentative Decision on South Carolina Authorization

As noted above, EPA tentatively concluded that the South Carolina statute did not render the State program inconsistent under 40 CFR 271.4(a). In reaching this conclusion, the Agency considered all available facts. It appeared reasonably clear from the face of the statute that the fee schedule was not a ban and that it did not operate as a ban. The evidence before the Agency did not indicate that the fee schedule had significantly affected the flow of hazardous waste into the State. However, because the amended statute was a potentially significant change to the State program which might affect authorization under 40 CFR 271.4, the Agency solicited comment on whether the fee schedule unreasonably restricts or impedes the flow of hazardous waste into South Carolina.

C. Public Comment

Public comment, with one exception, supported EPA authorization of the State program. Several commenters did not address the question of the fee schedules but generally stated that South Carolina's RCRA program was supported by adequate legal authority and staffing and therefore deserved authorization. The only land disposal

facility in South Carolina known to the Agency to accept out-of-State hazardous waste and to pay the fees at issue also generally supported authorization, but did not address the question rasied [sic] by the fee schedule.

Several other commenters who favored authorization argued that the fee schedule was reasonable and justified. They provided a variety of rationales including that the higher fees were appropriate: (1) To discourage land disposal as it is environmentally the least desireable [sic] form of disposal, (2) to raise money that might be expended to address released [sic] from land disposal units, (3) to discourage land disposal and thereby conserve the State's limited land disposal resource, and (4) to supplement State funds for monitoring compliance at land disposal facilities accepting out-of-State wastes.

The State of South Carolina commented that the one land disposal facility in South Carolina which accepts out-of-State wastes charges $90.00 per ton for disposal. First, the State noted that the new fee differential of $5.00 per ton for out-of-State wastes represents but a small percentage of this charge. The State believed that this small amount would not discourage out-of-State generators from using the facility. Second, the State noted that during the period of July to September of 1984 there were 16,848 tons of out-of-State waste disposed at the facility. During the same period in 1985, when the new fee schedule was in place, there were 26,352 tons of out-of-State waste disposed. The State cited this increase as factual proof that the fee schedule has not had any adverse impact on the amount of waste imported into the State. The State reported that fees had been collected at both the $18.00 rate and at higher rates corresponding to the fees of the States from which the wastes were shipped. Third, the State noted that a fee differential, including rates equivalent to those charged in the shipping State, had existed for several years and that there has been a continuing increase in the volume of wastes imported into the State.

The Hazardous Waste Treatment Council was alone in opposing authorization for South Carolina. The Council did not dispute that the volume of imported waste had increased despite the higher fees. Rather, they believed [46439] that the fee schedule discriminates on its face against interstate commerce and therefore was an unconstitutional and unreasonable restriction on the free flow of waste. The Council argued that: (1) The disparity in fees rendered the program "inconsistent" under RCRA 3006(b) as it did not promote the essential uniformity among hazardous waste programs intended by Congress, (2) the disparity in favor of in-State wastes was unconstitutional and therefore was inconsistent under RCRA 3006(b) and an unreasonable restriction or impediment under § 271.4(a), and (3) discriminatory statutes will frustrate RCRA objectives for a national market for development of proper treatment and disposal practices.

The Council stated that in promulgating 40 CFR 271.4, EPA had adopted a constitutional test to determine what is an unreasonable restriction and impediment. Therefore, they argued that the unconstitutional statute violated § 271.4(a). They also argued that it would be too difficult to assess whether there is in fact a significant discrimination on a case-by-case basis.

EPA believes that these are the substantive comments relating to the fee schedule and the Agency's decision. These and other comments are addressed in this notice and in a separate comment and response document that is available from EPA Region IV (address listed at the front of this notice).

D. Application of § 271.4(a) to South Carolina's Fee Schedule

EPA carefully evaluated the above comments in determining whether the South Carolina fee schedule was an unreasonable restriction or impediment to the free movement of hazardous waste.

The Agency has determined that in applying § 271.4(a) to State laws and regulations, EPA should look to whether the State provision in fact has or is likely to have a significant adverse effect on the follow [sic] of hazardous waste into or out of the State. Thus, the unreasonableness of the restriction or impediment under § 271.4(a) should be measured by the impact of [sic] likely impact on the actual flow of waste. In applying this test, EPA will look to all relevant factors. The Agency will primarily focus on any available evidence on the quantities of wastes that are imported and exported.

The Agency believes that this test is a reasonable interpretation of its regulation and does not conflict with section 3006 of RCRA. Section 271.4(a) does not by its terms prohibit any restrictions or impediments, only those that are unreasonable. Reasonable restrictions or impediments can logically include those that do not significantly decrease the flow of hazardous waste. Therefore, EPA does not agree that *any* disparity in treatment between in-State and out-of-State wastes is *per se* unreasonable. Contrary to the statement by the Hazardous Waste Treatment Council, the preamble adopting this regulation did not state that EPA was relying on the Constitutional test for impermissible restraints on interstate commerce as the basis for finding restrictions or impediments unreasonable. The Agency is not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and declines to do so here.

EPA also believes that its interpretation of the regulation accords with RCRA. RCRA section 2006 [sic] requires EPA to approve State programs unless it finds they are: (1) Not equivalent, (2) not consistent, or (3) lacking adequate enforcement authority. To be equivalent, States must adopt a set of basic statutes and regulations that are equivalent to EPA's. In addition, States may adopt requirements which are more stringent or different than

EPA's authority. More stringent requirements are expressly permitted by RCRA section 3009. These requirements may have some adverse effect on interstate commerce. Different requirements are permissible if they are not inconsistent with the Federal program and approved State programs. Authorized States have adopted many State requirements that are unlike the requirements of other States and which, in some cases, have an effect on the flow of wastes. The Agency does not believe that the mere existence of differences or disparities in treatment makes State programs inconsistent *per se*. Congress expected that States would not have identical programs and recognized the importance of allowing States to experiment with different requirements. Congress gave EPA the authority to interpret the term "consistent"; the Agency has interpreted the term in § 271.4 to prevent unreasonable restrictions or impediments in authorized programs. Nothing in RCRA section 3006(b) or any other section of RCRA requires the Agency to adopt the Constitutional test as the test for consistency or unreasonable restrictions or impediments.

The Agency does not believe that higher fees for out-of-State wastes or other discriminatory practices should be encouraged. EPA is concerned that such fees may discourage wastes from going to the most appropriate facility for treatment or disposal.

However, it appears that South Carolina's fees schedule does not have a significant adverse effect on the flow of hazardous waste into or out of the State. All available evidence supports this conclusion. The fact that the fee differential is small in most cases indicates that the out-of-State fee probably will not restrict a significant volume of waste. Moreover, the fact that the volume of out-of-State wastes increased significantly after the higher fees were imposed suggests that there is not a significant adverse impact on the flow of wastes. The fees clearly do not operate as a ban in this case. In addition, some fees

were collected at the higher rate based on the fees of other States. Finally, the volume of wastes imported into the State has increased over the years despite a fee differential which included fees based on those in the State of origin. Although it is unknown how much more waste might have entered South Carolina if there were no fee differential, there is no information to suggest that a significant volume might be affected. The Agency disagrees that this test (which looks to the facts of each case) is too difficult to apply.

Several comments related to the reasons for the State's adoption of the fee schedule and one addressed the concern that discriminatory practices would frustrate RCRA objectives for a national market for proper treatment and disposal practices. EPA acknowledges that the State offered several reasons for the fee differential. However, the Agency believes that the reasons for the adoption of the fee or any purportd benefits are not generally relevant to the question of reasonableness of the impediment or restriction. If a provision has little or no impact on the flow of wastes, EPA does not believe that the actual motives or benefits resulting from the provision should preclude authorization. EPA is also concerned that different provisions for in-State and out-of-State wastes may frustrate the best possible treatment and disposal of wastes. As noted above, RCRA intended that State programs be generally uniform for purposes of encouraging proper treatment and disposal and EPA has interpreted this consistency requirement to deny authorization where restrictions or impediments are unreasonable. It does not require EPA to deny authorization merely because in-State and out-of-State wastes are regulated somewhat differently by the State. In any event, there is no evidence that proper [46440] treatment or disposal is adversely affected by this statute; the volume of wastes into South Carolina has increased.

In applying this facts and circumstances test, EPA is aware that circumstances may change over time. The

Agency will therefore periodically reassess provisions which may unreasonably impede the flow of wastes, including this fee schedule of South Carolina. In addition, any provisions adopted by States seeking authorization and which impose or result in restrictions or impediments or result in restrictions or impediments on the flow of wastes will be subjected to careful scrutiny. If an authorized State adopts restrictions or impediments that may affect the flow of hazardous wastes, EPA may find that such changes are significant revisions to the State's program and provide public notice and comment under § 271.21 on their potential impacts on interstate transportation of wastes. If the restrictions or impediments are found to be unreasonable, they would be grounds for withdrawal of the authorized program under § 271.22.

For the reasons discussed above, EPA has concluded that South Carolina's fee schedule is not an unreasonable impediment or restriction on the flow of waste into the State and that authorization is not precluded by § 271.4 (a). Nevertheless, the Commissioner of the South Carolina Department of Health and Environmental Control has informed the Agency that he will recommend to the South Carolina Legislature that it repeal that aspect of the fee schedule which imposes higher fees based on rates charged by the State of origin. EPA supports this effort.

South Carolina is not authorized by the Federal government to operate the RCRA program on Indian lands and this authority will remain with EPA.

Final authorization is hereby granted to South Carolina to operate its hazardous waste management program in lieu of the Federal program subject to the limitation on its authority by the Hazardous and Solid Waste Amendments of 1984 (Pub.L. 98-616, November 8, 1984). South Carolina now has the responsibility for permitting treatment, storage, and disposal facilities within its borders and carrying out the other aspects of the RCRA program. South Carolina also has primary enforcement

authority, although EPA retains the right to conduct inspections and make information requests under section 3007 of RCRA and to take enforcement action under sections 3008, 3013, and 7003 of RCRA.

Prior to the Hazardous and Solid Waste Amendments (HSWA) amending RCRA, a State with final authorization administered its hazardous waste program entirely in lieu of EPA. EPA's regulations no longer applied in the authorized State, and EPA could not issue permits for any facilities the State was authorized to permit.

Now, however, under seciton [sic] 3006(g) of RCRA, 42 U.S.C. 6226(g), the new Federal requirements and prohibitions imposed by the HSWA take effect in authorized States at the same time as they take effect in non-authorized States. EPA is directed to carry out those requirements and prohibitions, including the issuance of full or partial permits, in authorized States until the State is granted authorization to do so.

As a result of HSWA, there will be a dual State-Federal regulatory program in South Carolina. To the extent the authorized State program is unaffected by the HSWA, the State program will operate in lieu of the Federal program. EPA will administer and enforce the portions of the HSWA in South Carolina until the State receives authorization to do so. Among other things, this will entail the issuance of Federal RCRA permits for those areas in which the State is not yet authorized. Once the State is authorized to implement a HSWA requirement or prohibition, the State program in that area will operate in lieu of the Federal program. Until that time the State will assist EPA's implementation of the HSWA under a Cooperative Agreement.

Federal HSWA requirements that are more stringent than the State's program apply in South Carolina. Any State requirement that is more stringent than a Federal HSWA provision also remains in effect. (South Carolina

is not being authorized now for any requirement implementing the HSWA.)

EPA has published a Federal Register notice that explains in detail the HSWA and its effect on authorized States. Refer to 50 FR 2872-28755, July 15, 1985.

Compliance With Executive Order 12291

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Certification Under the Regulatory Flexibility Act

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this authorization will not have a significant economic impact on a substantial number of entities. This authorization effectively suspends the applicability of certain Federal regulations in favor of South Carolina's program, thereby eliminating duplicative requirements for handlers of hazardous waste in the State. It does not impose any new burdens on small entities. This rule, therefore, does not require a regulatory flexibility analysis.

List of Subjects in 40 CFR Part 271

Hazardous waste, Indian lands, Reporting and recordkeeping requirements, Waste treatment and disposal, Intergovernmental relations, Penalties, Confidential business information.

Authority: This notice is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b), and EPA Delegation 8-7.

Dated: November 5, 1985.

Jack E. Ravan,

Regional Administrator.

[FR Doc. 85-26814 Filed 11-7-85; 8:45 am]